

1 seems to be pretty clear there is a basis in the
2 record for lessers if it's requested. The only
3 question I had is whether the Court is obligated to
4 give it if nobody asks for it. That's the law in some
5 states.

6 THE COURT: I don't think that is the law in
7 Delaware, but I'm also at a stage if -- if you don't
8 ask for it and persuade me, I believe the testimony is
9 that she had the gun, the gun discharged in her hand,
10 and his only participation was to reach down and hit
11 the gun. I see no criminal culpability to trying to
12 disarm an armed person. And, therefore, if they find
13 it was an accident, they should acquit.

14 MR. MAURER: Unless we can disabuse you of
15 that, then there will be no lessers.

16 THE COURT: That's really where I am.

17 MR. OTERI: We also have to get his
18 permission. He is -- on the record we should state he
19 advised us on numerous occasions we aren't to ask for
20 lessers. So unless we can get his permission to even
21 make that argument, it's -- it's kind of a waste of
22 time.

23 THE COURT: My belief is if the jury believes

1 his story and finds Deborah MacIntyre was there and
2 possessed the gun and was raising the gun and he
3 reached out to hit it, he is entitled to an acquittal,
4 that he committed no crime in attempting to disarm an
5 armed woman, indeed, because he didn't have anything
6 to do with the aiming of the gun or the discharge of
7 the gun. It was totally in her possession at the
8 time. But if you have -- if you wish to make an
9 argument and can persuade me otherwise, then I'm
10 prepared to hear that.

11 MR. MAURER: Okay.

12 MR. WHARTON: As far as I think who -- what
13 the law is in Delaware about who -- the Court's
14 obligation to give lesser included offenses, if either
15 party wants it or doesn't want it, I think there is a
16 couple cases that deal with that. One of them is
17 Roland Daniels I think.

18 MR. MAURER: Roland.

19 MR. WHARTON: Old friend. And just my -- my
20 recollection of it, because it came up in a case I had
21 not all that long ago, was that whichever -- I mean,
22 either side had veto power. Either side gets
23 automatic lesser included upon request. It's based

1 upon whether there is a rational basis in the evidence
2 for it.

3 MR. MAURER: I think I agree with that.

4 THE COURT: I'm just making you aware of my
5 view of the evidence now. And I have given some
6 thought to this. The testimony of the defendant was
7 that she had the gun in her possession. And he
8 reached down and tried to stop her from raising the
9 hand -- there is no evidence that he in any way
10 precipitated the discharge of the weapon -- and -- and
11 that she discharged the gun, that it was an accident.
12 And he has no criminal culpability.

13 Again, that's my view of the evidence. And
14 so I have no intention of giving a lesser included
15 offense unless there is a request and a basis for that
16 request.

17 MR. MAURER: Understood.

18 THE COURT: Are there other areas of specific
19 instruction?

20 MR. MAURER: I'm sure, you know, we will be
21 talking about instructions about accomplices and
22 people given immunity. I read your charge a while
23 ago, but I haven't reread it. The main thing I did

1 note was your preliminary finding was murder first
2 degree was the only crime you would charge on. We may
3 request a charge on abuse of a corpse if we can find
4 some authority, to ask you to consider that.

5 THE COURT: As a lesser included?

6 MR. MAURER: As a lesser included.

7 There are a couple interesting cases over the
8 last year or two where there was actually a charge
9 given not in the indictment. I'm trying to remember
10 the name of the case. I'll find it.

11 MR. WHARTON: It expanded the concept of
12 lesser included a little bit.

13 MR. MAURER: They really have. It was
14 against my view of what the courts always did, where
15 they charged a charge not actually in the indictment
16 itself. It was a different charge. I'll pull that
17 case before making that request. You're looking at me
18 quizzically, but I know I read that case.

19 THE COURT: I'm looking at you quizzically
20 because somebody ruled that way.

21 MR. MAURER: Actually the Supreme Court.

22 THE COURT: Oops.

23 MR. MAURER: It wasn't Moorehead.

MR. O'DONNELL: You get the first

THE COURT: It's going to read, You must not allow your findings to be influenced by the possible consequences of a given verdict. In our system, the duty of the jury is limited to determination of guilt or innocence except as to the charge of murder in the first degree. Your verdict should not be influenced by reflection upon the result thereof. You should not allow the nature of the punishment, or absence thereof, to enter into your judgment.

MR. WHARTON: That doesn't make any sense. Result thereof is the result of the hearing which you just referenced and taken out.

THE COURT: Well, except they've already been instructed in the beginning. They know that. We're just not dwelling on.

MR. CONNOLLY: Just what I would suggest, I think we can all -- well, is just we have the very first sentence. But we delete, In our system the duty of the jury, we delete that sentence as well. We pick up with, Your verdict should not be influenced upon the result thereof.

MR. WHARTON: Result thereof doesn't refer to

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anything now because we've taken out the antecedent to that.

MR. CONNOLLY: It would refer to your verdict. If you leave out -- my point would be, to correct the issue Mr. Wharton has spotted, if we have only the first sentence followed by, Your verdict should not be influenced by the reflection of the result thereof, thereof now refers to verdict.

THE COURT: Verdict alone.

MR. CONNOLLY: Right. No confusion, and we don't bring in the duty of the jury sentence.

THE COURT: What about the last sentence in also?

MR. CONNOLLY: Yes.

MR. MAURER: Yes.

THE COURT: First sentence and the last two?

MR. O'DONNELL: Right.

MR. CONNOLLY: Yes.

THE COURT: All right. Have complied with your agreement.

MR. MAURER: Thank you, Your Honor.

THE COURT: I always like that.

MR. O'DONNELL: Then --

THE COURT: Particularly when it shortens the instruction.

Now, are we ready to address the issue of proposed lessers? Anything we have now is ready to go to the printer.

MR. O'DONNELL: We can do that.

MR. MAURER: My friend from Florida is going to argue this argument.

MR. O'DONNELL: Yes. This is a little bit complicated. And hopefully, I think I can present it in about five minutes if I'm not interrupted. If that helps at all.

THE COURT: I'll try not to interrupt you, Jack.

MR. O'DONNELL: Okay. It seems to me that, well, we know that the indictment charges first degree murder, which is intentional killing as defined by the instructions committed by a voluntary act of the defendant.

We know what his testimony is, which is essentially that he did not do that. There's very little direct evidence in this case concerning the events of June 27. State got a few things but, frankly,

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most of the strength of their case goes more to substantial planning, the premeditation part which is not something the jury decides now than it does to the question of intent.

And conversely, we have evidence that falls on the other side. For example, some of the evidence in favor of the State: Debby MacIntyre says she purchased the gun for him; he denies that; the testimony concerning the extortion that comes from various witnesses and has come in different packages; the cooler, whether it was bought for the purpose the State intends or whether it was bought at Joe Capano's suggestion; whether Tom was a jealous maniac or not.

We believe that there's substantial evidence in the record to refute the issue of an intentional killing; namely, the purchase of the Jackson Brown tickets, e-mail connecting -- or asking her to save that date in August; that came out in April or May; the fact that Kay Ryan was surprised to see Tom that morning; the fact that there was no plan to see Gerry and, in fact, Gerry and Louie both say it was only pure luck that Gerry was there; normally, he's at Stone Harbor in late June; Susan testified Tom was fine when she saw him

1 5:30, six o'clock; testimony of various witnesses
2 earlier in the week and on the 27th; Tom was trying to
3 set up a golf game for the 28th; Henry Supinski's
4 testimony that he expected to walk with Tom Capano on
5 the 28th -- all of this evidence cuts against the grain
6 of an intentional killing.

7 We know that under Ward versus State there
8 must be a rational basis in the evidence for you to give
9 lessers. What the Court indicated last week is that the
10 Court is under the belief at this point that either the
11 jury will come back with a verdict of murder in the
12 first degree or, if they accept Tom's explanation, it
13 was an accident for which he has no criminal
14 culpability.

15 It seems to us, and we are specifically making
16 a request that the Court charge in the following
17 lessers; second degree murder, manslaughter, criminally
18 negligent homicide, and abuse of a corpse.

19 THE COURT: I don't believe abuse of a corpse
20 is a lesser, and for that reason, I mean, I don't think
21 you can find anything within intentional -- within the
22 definition of intentional homicide that involves abuse
23 of a corpse. This is a separate offense and therefore

1 I'm not going to charge on that as a lesser.

2 Let's address the others. Excuse the
3 interruption. I didn't want to waste time on that
4 because I wasn't going to buy it.

5 MR. O'DONNELL: At the end, I would like to
6 throw in two cents to complete the record for appellate
7 purposes on that.

8 It seems to me that the jury could well
9 conclude that Tom Capano's action -- if Tom Capano was
10 to be believed, then his reaching out for the arm of
11 Debby MacIntyre is in fact what caused that gun to
12 discharge, which then becomes the proximate cause of
13 Anne Marie Fahey's death. It seems that the jury could
14 conclude under the circumstances as he described them it
15 was reckless, that he had an indifference to the risk of
16 what his action might do, which would support second
17 degree murder, or it was plain and simple reckless which
18 would support manslaughter, or that he simply was
19 unaware of the risk of death by doing that because he
20 didn't see a clip in the gun and, therefore, it was
21 negligently culpable.

22 There is one case that's not exactly on point.
23 Well, I've done most of the research. Gene has given me

1 all his court sheets from trying these cases, couldn't
2 find anything directly on point. I don't know. This
3 state has one case, Zebrowski versus State, that is
4 analogous in a way. I got the cite here.

5 Is the Court familiar with that case?

6 THE COURT: No.

7 MR. O'DONNELL: 715 A.2d 75.

8 MR. OBERLY: What page?

9 MR. O'DONNELL: Seventy-five. In that case,
10 two guys decided to take a semi-automatic handgun after
11 doing drugs and drinking all day and rob the gas
12 station. One of the defendants, Sarro, S-A-R-R-O, was
13 cut a deal with the State, testified against Zebrowski.
14 He never testifies. The opinion doesn't tell you
15 exactly what he said. But the inference there, certain
16 testimony presented in the record comes from his
17 agreement that was admitted with both side's consent.
18 And that is that Zebrowski goes and points the gun at
19 the attendant. The attendant doesn't move. Doesn't
20 really comply. The gun is fired. The attendant dies.

21 At trial, Zebrowski testifies that Sarro, the
22 other co-defendant, punched the attendant in the mouth
23 which caused him to flinch and the gun accidentally

1 discharged. That was his defense at trial.

2 There was evidence also presented by an ATF
3 expert that the trigger pull on that particular gun was
4 12 and a half pounds, substantially more than what we
5 have here, and that Zebrowski was intimately familiar
6 with the use of firearms based on his background and
7 experience, which is the direct opposite of what we have
8 here. The evidence in the record here I think rather
9 conclusively is that Tom Capano didn't know a damn thing
10 about guns. That comes from Gerry. The only
11 distinguishing facts between the two cases was the
12 pointing of the gun.

13 Now, in Zebrowski, the trial court gave
14 instructions on second degree murder and manslaughter,
15 and the issue on appeal was whether it was error to not
16 give criminally negligent homicide. And the Supreme
17 Court agrees with the trial court that it was not error
18 to do that because of the intentional pointing of the
19 gun which in fact we don't have in this case. But it
20 seems to me that under those circumstances where the
21 defendant testifies essentially that there was an
22 accident, the Delaware Supreme Court has agreed that it
23 was proper, and I'm requesting the charge for second

1 degree murder and for manslaughter.
 2 It seems to me because of the dissimilarity in
 3 the facts in this case, the reason for not charging
 4 criminally negligent homicide in this case is not
 5 present in this case. And therefore, it would be proper
 6 for the Court to charge on criminally negligent homicide
 7 here as well.

8 The last argument I would make is, although
 9 this case I'm not citing for any other reason than the
 10 language, is *Gates versus State*, 424 A.2d 18. It relies
 11 on *Keeble versus United States*, one of the first U.S.
 12 Supreme Court decisions along with *Beck versus Alabama*
 13 on lessers; *Keeble* 412 U.S. 205, that due process, and I
 14 would argue under both Delaware and United States
 15 Constitution, guarantees a defendant instructions on
 16 lesser includeds if the evidence, under any stretch of
 17 the evidence, warrants it. And the reason for that is
 18 if there's any evidence in the record the jury should
 19 not be required to have to choose only between the
 20 extremes. And there's an implication that the due
 21 process clause of fundamental fairness jumps in at that
 22 point.

23 MR. MAURER: Just a moment to consult.

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1 MR. O'DONNELL: One last point is this. Since
 2 the State has not presented any direct evidence of what
 3 happened that night, including no direct evidence as to
 4 whether or not the killing was intentional, the jury is
 5 entitled to infer from that that any killing that
 6 occurred in that room was not intentional and therefore
 7 could have been recklessly indifferent, whatever all the
 8 words are in the standard for second degree murder, or
 9 reckless pursuant to the manslaughter standard, or
 10 criminally negligent pursuant to the criminally
 11 negligent homicide standard.

12 You want to jump in here?

13 MR. MAURER: No. I was just going to say that
 14 last argument is something we discussed earlier very
 15 briefly. We argue that the absence of any direct
 16 evidence of what occurred in that room allows the jury
 17 to reach a conclusion that if in fact they believe that
 18 Tom Capano killed her, evidence of recklessness or
 19 criminal negligence is equally plausible to that of
 20 intent. And on that basis, which is a separate basis I
 21 think than the other request, we're saying if they reach
 22 the conclusion that Tom killed her, while there's no
 23 direct evidence as to what occurred in the room, and

1 therefore either conclusion or any of those conclusions
 2 are equally plausible.

3 THE COURT: I understand that argument and
 4 I'll give the State a chance to respond to it. My
 5 concern here is that there's no question that intent is
 6 being proffered by the State in this particular case
 7 based upon circumstantial evidence of prior preparation,
 8 which, although it is an aggravating circumstance in
 9 this case, is a showing of planning and, therefore, the
 10 intent to carry out the plan which you've created and
 11 the subsequent acts which tend to give some indication
 12 of guilt as to what is of course subject to argument.
 13 The fact of the matter is that the State's theory
 14 produces some evidence of intent, but there isn't any
 15 evidence of recklessness or negligence in this
 16 particular case. That's not there. And Jack's basic
 17 argument is that it may have been reckless or negligent
 18 to try and disarm a woman with a gun.

19 I'm sorry, folks. I'll never let that go to
 20 the jury. If that's what the State was relying on,
 21 you'd have an acquittal right here. If I was going to
 22 acquit on it, I sure as heck can't charge it as a lesser
 23 included. I don't think there's anything there. If all

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1 we had now was his statement and there was no other
 2 evidence to be considered, that's an acquittal. If I
 3 accept his testimony, there's no way I'd let that go to
 4 a jury. I think if I wouldn't let it as a matter of law
 5 -- I would rule he was not guilty under those
 6 circumstances, there's no way I could charge as a lesser
 7 included, gentlemen.

8 MR. WHARTON: Just thought of something we'd
 9 like to clear up. And that when we sort of broached
 10 this topic before, there was a concern that there may be
 11 a division between counsel and the defendant.

12 THE COURT: I was going to get to that. Does
 13 that still exist?

14 MR. O'DONNELL: He authorized yesterday us to
 15 make a request for lessers.

16 THE COURT: Thank you.

17 MR. WHARTON: That answers that question.

18 At the risk of arguing once the point is won

19 --

20 MR. O'DONNELL: Is this Mr. Oberly or Mr.
 21 Wharton or Mr. O'Donnell this afternoon?

22 MR. WHARTON: I only wanted to suggest that I
 23 think a fair synopsis of his testimony was that not only

1 corroborated the details of his brother Gerry, the
2 defendant realized that he could not credibly dispute
3 all of that evidence. So he contorted his defense. He
4 tailored it to dispute as little of the evidence as
5 possible. And what we are left with is the ludicrous
6 account of what he gives of what happened on June 27th.
7 And the fact that it is so ludicrous, the fact that it
8 is not credible lends credence to the State's argument
9 that this was a planned killing.

10 Now, this is a murder case. The defendant has
11 been charged with First Degree Murder. Intentional
12 murder. You have to decide whether he intentionally
13 killed Anne Marie Fahey on June 27, 1996.

14 Mr. Wharton, in his opening statement, did not
15 tell you how physically Anne Marie died on June 27th,
16 and we have never tried to prove that to you, and I'm
17 not going to stand here today and tell you we know
18 exactly how Anne Marie Fahey physically died that
19 evening. What we did say we would prove, what we have
20 proved beyond a reasonable doubt is that starting at
21 least as early as February 1996 the defendant took steps
22 to prepare himself for the possibility that he would
23 kill Anne Marie Fahey. And as the months progressed

1 has introduced to show that this was a planned killing.
2 The most important piece of evidence is Gerry's
3 testimony. Gerry's testimony, as we will discuss, is
4 corroborated on virtually every detail that could either
5 be proved or disproved. The only details of Gerry's
6 testimony that could not be corroborated with direct
7 evidence are the conversations he had with the
8 defendant. So you ultimately will have to decide is
9 Gerry or the defendant telling the truth about those
10 conversations. And you will see that the evidence we
11 did introduce makes the defendant's versions of those
12 conversations not believable.

13 The second area of evidence concerns the
14 cooler, the lock and the chain. As I said the cooler is
15 the ultimate corroboration of Gerry. When Gerry came
16 into the Government on November 8th he didn't know we
17 would find the cooler, no one knew, no one expected it.
18 He told a tale that might at first hearing sound beyond
19 the realm of, well, a fantasy, a fantastic tale. He and
20 his brother dumped the cooler out in the ocean and he
21 shot a bullet through that cooler. But it wasn't a
22 fantastic tale. Ken Chubb found the cooler and
23 corroborates what Gerry said. The lock on the cooler --

1 from February to June he took further steps and
2 ultimately insured that that was not a possibility. He
3 planned to kill her. It was not a perfect plan. He
4 needed somebody to help him dispose of the body in the
5 ocean, and he thought the cooler would sink. It didn't.
6 And that cooler is the ultimate corroboration of Gerry
7 Capano. But despite those two imperfections, he
8 nonetheless planned the killing, and the evidence, as I
9 will discuss it with you, establishes that.

10 Now, I need to review with you some three
11 months of evidence. And we appreciate your patience to
12 date, and I trust that I can rely on that patience as we
13 proceeded this morning. It is important that we
14 discuss -- that we review the evidence. And when you
15 consider all of the evidence in its totality you will
16 see it is an amount of evidence which demands only one
17 verdict, and that's a verdict that I will ask that you
18 return at the end of my closing, a verdict of guilty.

19 Now, I'm a list person and I find it helpful to
20 categorize things in examining them. I suggest to you
21 when you look at the evidence it is very helpful to
22 consider the five categories. These five categories
23 represent the major pieces of evidence that the State

1 chain on the cooler, given no background found in his
2 home in 1996.

3 The third area of testimony concerns Deborah
4 MacIntyre's testimony about purchasing the gun.

5 The fourth area, I suggest to you, is the
6 defendant's demeanor on June 28th. We know this from a
7 variety of witnesses and ultimately it was confirmed by
8 the defendant's own testimony. This was a man who was
9 very calm, collected on June 28th after Anne Marie Fahey
10 was killed. That belies any claim that this was an
11 accidental shooting. It belies any claim that the woman
12 he loved threatened to commit suicide on the evening
13 before. It is consistent with somebody who planned a
14 killing and executed it according to his plan.

15 The final area of evidence is really the
16 defendant's testimony itself. It is not credible. His
17 demeanor on the stand is consistent with the person Anne
18 Marie Fahey described to her psychiatrist and
19 psychologist and friends. It is consistent with the
20 person who wanted to control every aspect of Debbie
21 MacIntyre, and it is consistent with the person who
22 would not lie still as Anne Marie Fahey embraced Michael
23 Scanlon.

Now, before discussing these five categories of evidence, what I would like to do is start where we began this trial. We started by learning about Anne Marie Fahey as she existed on June 27, 1996. Then we traced her relationship with Michael Scanlon from 1995 through 1996. We looked at the fact that she had broken off the relationship with the defendant in 1995. It is important to start with Anne Marie Fahey because although this is a murder case it is ultimately about control. It is about the defendant wanting to control others. And it is important to understand that Anne Marie Fahey, like Deborah MacIntyre, was especially susceptible to control. If you recall, her psychiatrist testified that in part she sought treatment because she had great difficulty in asserting herself in personal relationships. Her psychiatrist and psychologist described her as an empathetic person who could feel hurt when others were hurt. Who felt guilty and shame for things she wasn't responsible for. This is the type of person who was especially susceptible to a person like the defendant.

Anne Marie Fahey was not a perfect person, the State never suggested she was. She had her flaws like

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everybody. She wanted to live beyond her means. She had a troubled childhood. She was immature at times. She suffered from an eating disorder. She was carrying on an adulterous affair with the defendant. As I said, she was easily intimidated, she was not assertive. And Tom Capano offered her financial security that she did not have, had never known. He was very generous to her. She confided in him. She appreciated the fact that she could confide in him.

But in 1995 things changed. In 1995 she met Michael Scanlon and the change in her views towards the defendant, the fact that she embraced Michael Scanlon are juxtaposed in that April 7, 1996 diary entry. At that point you see where Anne Marie Fahey has come from and where she is going. Whereas she had been with the defendant, she no longer was willing to tolerate what she viewed as his manipulations and control. She saw Michael Scanlon as the first normal healthy relationship she had and expressed in the diary entry her love for him.

To get a good view of the overall picture from both Gary Johnson and Michele Sullivan as to Anne Marie Fahey's relationship with Scanlon and with the

defendant, if you recall, Dr. Johnson testified that he had seen Anne Marie in '95 up through January of 1996. Dr. Johnson told us how Anne Marie described a relationship with the defendant, quote, as being characterized by this man pursuing her. Having a great -- wanting a great degree -- deal of control over her life. And as she began to want to pull away from that relationship he was unwilling to let her do so.

Doctor Johnson was asked: "What was her attitude towards this relationship?"

And his response was: "Well, I would say initially she described it in historical terms that she was quite attracted to this man, but by the time I saw her she described it mostly in terms of feeling very guilty and ashamed of being involved with him. And described it in terms of not being a healthy relationship. And particularly described it as one she wanted to get out of in the context of her finding a new and what seemed like a much healthier relationship with a different man."

This is what Anne Marie Fahey told her psychologist.

Dr. Johnson was asked: "Was she having any

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difficulties in ending it? Was there any difficulties in doing that for her?"

Answer: "Yes, there were quite a few difficulties. I mean, she would say she didn't want to see him and find he would continue to send her e-mail or written notes or suddenly appear at places where he was observing her, stalking may be too strong a word but certainly observing."

This is from Dr. Johnson so this pre-dates January of 1996.

How about Dr. Sullivan? Well, Anne Marie told her that she regarded the large number of phone calls that she was getting, the large number of e-mails, appearing at times where she wasn't ready to greet him in a public place, the fear if she went to someplace socially he might meet her there and persuade her to spend time with him.

Other things included, in the past, coming to her apartment uninvited and making his way into the house and making her very frightened in what was going to happen.

Anne Marie told Dr. Sullivan that she viewed the defendant's gifts, his references to his daughters

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If you remember Mr. Oteri when he

cross-examined Dr. Sullivan. He asked if people give in order to get? That is a fair credo for Tom Capano's generosity. He is giving and he is hurt when Anne Marie rejects his gifts. And the reason why she rejects the plane ticket is she does view it as manipulation and doesn't want the conditions he attaches.

New Year's Eve on the calendar, we know, and we know from Michael Scanlon's testimony, Anne Marie spends time with him. And in January things start to really look bad for the defendant. If you look on January 17th, there is an e-mail -- actually on tab four of the book you have. Now I'm not going to go through all of the e-mails, I know we have done a lot of that during trial. But if you have any doubt that these e-mails do not show the manipulation, the refusal to stop pursuing Anne Marie Fahey, I encourage you to read all of the e-mails. Read them in their entirety, because it is subtle. Look at the January e-mails and you will see the defendant asking Anne Marie to have dinner with him. He is relentless, he is suffocating, he will not stop. Look at her responses, she doesn't say no, doesn't say

yes, she ignores the request, that is her way of dealing with things.

In January she hadn't started seeing Michele Sullivan, she is still struggling with assertiveness. Her way to deal with Tom Capano is not responding directly to the overtures she doesn't want. Once in a while she does respond directly and she feels bad. And if you see this January 17th e-mail, she writes the defendant: "Good morning, Tommy. I want to apologize for my outbreak last night. I am sure it must have scared, amongst other feelings, you. Quite honestly I scared myself last night. Tommy I had a lot on my mind last night regarding my appointment with Gary Johnson. I know I only talked very briefly about my meeting but it obviously was on my mind. Right now I need a friend more than anything else. There was a part of me that just wanted to be alone to think things out clearly. So when I asked you not to rub my stomach and you responded by saying how much I hurt you, I couldn't take feeling guilty about what had happened along with everything else that I am feeling. It is my fault, because I was not communicating with you and you didn't know how to respond. I am sorry for my behavior."

Now she is apologizing to him because she resented the fact that he was rubbing her tummy and she told him so. That is January 15th.

Three days later the defendant has dinner with Anne Marie Fahey and Jackie Steinhoff. Remember how that dinner was set up? Anne Marie Fahey kept on saying to Jackie, I'm really not interested. She wouldn't say no directly she just kept putting it off. Finally she gave in and they had dinner. During the dinner Anne Marie Fahey goes to the bathroom and the defendant turns to Jackie Steinhoff and says: "Why does she hate me?" This is a 47 year old man turning to a 30 year old woman asking why her good friend hates him. I suggest to you that is the first sign where we see kind of an obsession. Direct evidence of an obsession on the defendant's part for Anne Marie Fahey, that is January 20th.

On January 26th, Anne Marie has her surprise birthday party, the defendant is not invited. And you can see in the e-mails when you back to the jury room, you can see him pressing her for what is going on in the upcoming weekend. He wants to have this birthday dinner with her. And she doesn't point-blank reject him.

On January 27th she has the Grand Gala with Michael Scanlon and we heard from Jill Morrison that the defendant -- and the defendant confirmed with his string of calls that he was pestering Anne Marie with a string of phone calls that Saturday. Anne Marie was distraught by these phone calls, but she had the best night of her life, according to what she told her friends, with Michael Scanlon later that night. So you can see where this triangle is going. Anne Marie is going with Michael Scanlon and the defendant is not happy.

On February 4th, a week later, we know that Anne Marie Fahey point-blank finally told the defendant she just wanted to be friends. And remember, we know that was a Sunday, February 4th, we know it because of the later e-mail that we read when the defendant was on the stand. The next day after she tells him this, he has his daughter send Anne Marie an e-mail. She has to remind him three days later I just want to be friends, and this is February 7th. What does he do on February 8th? He again e-mails her, again makes a reference to children, to his being distressed about, if you recall, the events at the Ursuline School on February 8th. And that's the day he gets \$8000 from Gerry Capano.

1 No why does the defendant have to ask me
2 Capano for \$8000 in cash? This is a man who had
3 \$156,000 in his checking account that day. There is
4 nothing illegal with cashing a check for \$25,000. And
5 you heard the defendant get tripped up on the timing of
6 the checks. He said that he called Gerry after he had
7 cashed the first two checks, but in fact, as we showed
8 with the bank records, he had Gerry cash the check after
9 he had cashed the first check, before the third check
10 came along. So his recollection, or rather his story,
11 about the timing of the checks just doesn't make sense.
12 There is no legitimate reason to try to disguise the
13 money transactions that he did. So why? It just
14 doesn't make sense that he would try to give Anne Marie
15 Fahey \$25,000 in cash. He didn't need to give her that
16 kind of money in cash to shock her. Doesn't make sense
17 that he would take \$24,000 back from her not deposit it
18 in the bank but keep it in this Grant Avenue house, the
19 security of which he is very concerned about, we are
20 told. Doesn't make sense that he would have \$24,000 in
21 cash on him and yet during the next 12 months go to the
22 bank and take out \$12,000 in cash during those next 12
23 months. That story doesn't make sense. The only thing

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1 that makes sense is getting the \$8,000 in cash, as far
2 as it concerns us, is that Gerry now believes that the
3 defendant is being extorted. Gerry believes that there
4 is a legitimate, if you will, reason why the defendant
5 might need a gun, might need a boat, might have to kill
6 somebody. And I say legitimate in quotes. But Gerry
7 thinks now that there is some explanation as to why the
8 defendant is coming to him asking him for the gun,
9 asking if him if he knows somebody who can break some
10 legs, asking him if he could use his boat if he killed
11 somebody.

12 Four days after the defendant approaches Gerry
13 and says I'm being extorted, I need \$8000, four days
14 later we have the February 12th e-mail. And if you
15 would look at that. This is on page 40. Anne Marie
16 writes: "Good morning, Tommy." If you go down about
17 five lines, second paragraph she says: "Tommy, you
18 scared me this weekend, starting with Friday and all the
19 calls you placed. It really freaks me out when you call
20 every half hour. I truly understand how fragile you are
21 these days and I feel the same way. But when you keep
22 calling that way it makes me turn the other way and,
23 quite frankly, shut down."

1 So, there is direct evidence that she finds his
2 string of calls, to use her euphemism, harassing. The
3 harassment in her mind. And look what her response is,
4 go a little bit further down. She says: "I'm sorry
5 that I am nothing but a constant disappointment to you
6 these days, it is not fair to you."

7 She is apologizing for him harassing her with
8 phone calls. Just like with the stomach.

9 But it is soon after this call that she begins
10 her counseling sessions with Michele Sullivan and they
11 start working on her ability to be assertive. Two days
12 after this e-mail she, Anne Marie, celebrates
13 Valentine's Day with Mike Scanlon. And you saw the card
14 in evidence, you can see how moved she was by the
15 flowers he sent, the fact that she kept these
16 memorabilia from Mike Scanlon in the drawer, the
17 tickets, the cards. And we know from Ginny Columbus
18 that a day after Valentine's Day Anne Marie throws the
19 defendant's dozen roses into the trash can. Now we also
20 know that sometime around Valentine's Day, sometime
21 between February 13th and February 16th, the defendant
22 saves in the permanent file, the archives of his
23 computer, all of these e-mails. Why? I submit to you

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1 again, this is just like the January 20th comment to
2 Jackie Steinhoff. This is evidence of his obsession.
3 To save all of those e-mails on this day, two to three
4 days after Anne Marie Fahey says please stop, I can't
5 take the harassing calls, you are scaring me. A week
6 after he first approaches Gerry, this is the beginning
7 of the plan.

8 MR. CONNOLLY: Your Honor, I think it would be
9 good to break here.

10 THE COURT: All right.

11 Please take the jury to the jury room.

12 (The jury exited the courtroom at 10:10 a.m.)

13 THE COURT: Court will stand in recess for 15
14 minutes.

15 (Following a brief recess:)

16 (The jury entered the courtroom at 10:25 a.m.)

17 THE COURT: Please bring the jury in.

18 Counsel, I should note while totally entranced
19 by Mr. Connolly's argument, I was reviewing the charge.
20 And I note in the First Degree Murder charge the last
21 line indicated that, "you should find the defendant not
22 guilty" and it should read, "you must find." And I have
23 made that change and that will be in the charges that go

1 you have read. And on April 7th, four days after she
2 tells Michele Sullivan about his haunting behavior, she
3 writes in her diary that the defendant -- she has
4 finally been able to bring closure to that relationship.
5 That he is a jealous, manipulative, controlling maniac
6 and she is in love with Michael Scanlon. Three days
7 after writing that entry she meets with Dr. Sullivan,
8 this is April 10th. It is April 10th -- it is in the
9 April 10th session when Dr. Sullivan first hears of this
10 kidnapping, that Anne Marie has some fear which she
11 expresses in very vague ways. But she has a fear of
12 being kidnapped by a third party and Dr. Sullivan
13 presses her on this point, by who? And the only name
14 that she gives is Tom Capano. And Dr. Sullivan even
15 presses her for another name. She said could it be
16 somebody else? And she said maybe it is an old
17 boyfriend, but it is a third person hired by somebody
18 else.

19 Now, it is true that Anne Marie point-blank
20 didn't go to Dr. Sullivan and say I believe Tom Capano
21 is trying to kidnap me. But that is consistent with
22 what Dr. Sullivan says about Anne Marie's general way of
23 approaching issues. That if you remember she said she

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1 was giving a little wisp, give you a little bit and wisp
2 away and you would have to come back to it. But it was
3 enough that Dr. Sullivan recalled it, and asked Anne
4 Marie to act on it. She asked Anne Marie on April 10th
5 to contact the Attorney General's office and report the
6 harassment, the harassing phone calls. So that is April
7 10th.

8 April 15th, if you look in the calenders you
9 will see that Anne Marie wrote for the first time that
10 there was a monthly anniversary, if you will, with Mike
11 Scanlon, April 15th she writes seven month anniversary.
12 She hadn't done that for the first six months. It
13 suggests at this point her feelings for Michael are
14 growing stronger, that she is attaching more
15 significance to the relationship than before, and, in
16 fact, if you follow that calender from seven months
17 until September 15, 1996, you will see that she marks in
18 her calender every month on the 15th that is the
19 anniversary with Michael or Miguel. She is
20 forward-looking in this relationship. So that's April
21 15th.

22 Two days later she meets with Dr. Sullivan.
23 This is April 17th, now we are only 10 days after the

1 diary entry. This is an important time. They again
2 talk about the kidnapping issue. They talk about Anne
3 Marie failing to report anything to the Attorney
4 General's office, but at least she did make a phone call
5 to inquire about it. And then three days later, the
6 defendant buys the cooler. I submit to you the timing
7 is not an accident. Although, we do not have the e-mail
8 so we cannot directly show you harassing behavior on the
9 part of the defendant in March and April, that is what
10 Anne Marie was reporting to her psychologist. She is
11 talking about a kidnapping. Her diary entry which makes
12 crystal clear her views towards the defendant. Mike
13 Scanlon is in this time frame. And this is the time
14 when he purchases the cooler. It is also around the
15 time when he has obtained the gun from Gerry and is
16 returning it. Again, we don't have servitude about that
17 timing, but it is sometime in March that he borrows the
18 gun and sometime around mid April to late April that he
19 returns the gun to Gerry.

20 If you look in Dr. Sullivan's notes, you will
21 see on April 24th Anne Marie indicates she is, quote,
22 unquote, getting closer to Michael. And you can look at
23 her calender and you can again see the events they

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1 attended in early May, consistent with what Dr.
2 Sullivan's notes indicate.

3 Then on May 8th the defendant takes Debbie
4 MacIntyre to Washington. Now he has been seeing this
5 woman for 15 years. He says he deeply loves her. He
6 has taken her on two trips, both of which are business
7 trips. He is going to legal conferences in Canada and
8 even this May trip is to Washington. But they are
9 clearly a big deal to Debbie MacIntyre, as indicated by
10 her testimony. And if you have any doubt about her
11 feelings look at the letters. The defendant knows that
12 she attached great import to her trip to Canada with him
13 and her trip to Washington. Remember, this is something
14 to think about. Anne Marie Fahey gets The Homestead
15 ritzy resort in West Virginia. Debbie MacIntyre gets to
16 tagalong to a legal conference in Washington and Canada.
17 Anne Marie Fahey gets the Hotel DuPont for lunch, she
18 gets La Famiglia, Villa Di Roma, Panorama. Debbie gets
19 Arnars. These are examples of how the defendant vastly
20 treats these women. He is absolutely correct when he
21 refers to Debbie MacIntyre in his letter as a doormat.
22 She is his doormat. And I submit to you it is no
23 mistake that he took her to Washington that weekend,

1 been in keeping with my dealings with the press, I
2 will release that, but mask the jury's signature and
3 seal the actual interrogatories. We've kept their
4 names secret this long. If they choose to disclose
5 them, that's up to them, but I'm not going to do it.

6 MR. O'DONNELL: Do you want me to raise it?

7 MR. MAURER: That part's a good starting
8 point.

9 MR. O'DONNELL: With respect to the
10 interrogatories, it's our position that unless the
11 jury unanimously answers yes to question 1, the Court
12 may not impose the death penalty; and the jury should
13 not be required to answer question 2, because the jury
14 would not have found, beyond a reasonable doubt, the
15 existence of a required statutory aggravating factor.

16 MR. WHARTON: I think that's the statute.

17 THE COURT: I think I have to go through the
18 same process and I make the final determination.

19 I'll simply tell you as a practical matter,
20 if they come back with a no there, then I'm certainly
21 not going to overrule their finding, but I think they
22 have to go through the whole process and I have to go
23 through the whole process separately.

1 is, and that's the same standard they've used in
2 deriving guilt or innocence, but if for some reason
3 the vote came out 10 to 2, then the statute still
4 gives me authority to go ahead and make my own
5 determination. It would be a lovely question on
6 appeal and --

7 MR. MAURER: That's why we're taking this
8 position.

9 THE COURT: Well, I note it, but I think the
10 statute suggests that I have to go through the same
11 process that the jury does and that their findings are
12 only a recommendation to me even on that.

13 I've simply told you that certainly if they
14 found there was no reasonable doubt, that would
15 probably mean it for me, although I don't know what I
16 would do if the vote was 11 to 1. I would love to
17 have this answer sheet come back so I don't have to
18 make any decisions at all and I hope that's the way it
19 comes back. But there are a lot -- the way our law is
20 written, the ultimate authority to answer both of
21 these questions rests with the Judge although they
22 should take it into consideration, the findings of the
23 jury, and give great weight to it.

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1 MR. MAURER: What if two of them say no?

2 MR. OBERLY: Suppose there's a 10 to 2 vote;
3 is that beyond a reasonable doubt?

4 MR. WHARTON: That's not what the jury is
5 supposed to do.

6 The jury is supposed to report their vote as
7 to how each one of them thinks that question ought to
8 be answered. They don't have to be unanimous on
9 that. There's no requirement of unanimity. Beyond a
10 reasonable doubt is merely the standard by which they
11 judge whether that has been proven. It doesn't say
12 unanimously find.

13 MR. OTERI: The question says, does the
14 evidence show, beyond a reasonable doubt, the
15 existence of the following.

16 MR. WHARTON: Right. Right.

17 MR. OTERI: That's what they're voting on.

18 THE COURT: Yes, but it does not have to be
19 unanimous. It is not the verdict here.

20 MR. OTERI: It's beyond a reasonable doubt.
21 What is that? You've got to assign a numerical value
22 to it.

23 THE COURT: No, I've instructed them what it

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1 MR. OBERLY: I understand.

2 MR. WHARTON: No, the statute says the jury
3 is to report to the Court its final vote, stating the
4 number of affirmative and negative votes on each
5 question. If the jury is split on one question, on
6 the first question, that is not a preclusion to going
7 ahead to the next question. That merely tells the
8 Judge that the jury is split on that and makes that
9 recommendation as to the appropriate answer. They
10 don't have to be unanimous on that, on any -- on any
11 question. There is no -- it's not like the old
12 statute where you had to -- the jury had to
13 unanimously agree beyond a reasonable doubt that there
14 was a presence of a statutory aggravator before they
15 could go on to balancing aggravating and mitigating
16 and then going on to unanimously recommending the
17 death. That was the old statute.

18 THE COURT: But I think Charlie and Gene both
19 understand that's what the statute says.

20 The question is whether that may meet
21 constitutional muster, and they've raised that issue.

22 MR. MAURER: I don't know whether that's been
23 resolved by the Supreme Court decisions and we don't

1 indicated to you, could speak and not be subject to
2 cross examination. There was nothing to permit him or
3 to -- excuse me -- there was nothing to keep him from
4 taking the stand and testifying on broader issues in the
5 penalty phase; however, had he done that, he would have
6 subjected himself to cross examination. So when he
7 indicated that there were things that he could not talk
8 about, he was right because the allocation is very
9 limited, but had a different form been chosen, those
10 limitations would not have been the same.

11 Mr. Connolly.

12 MR. CONNELLY: Thank you, Your Honor. Good
13 afternoon.

14 At the outset, I would like to thank you on
15 behalf of the State, Detective Donovan, Mr. Wharton and
16 myself for the extraordinary service that you've
17 performed these last few months. We are mindful, the
18 Court is mindful, defense counsel is mindful of the
19 burdens that you endured, the marathon closing
20 arguments, the scheduling problems. Things don't always
21 go smoothly, and it's really not necessarily anybody's
22 fault, but we do all appreciate what you've done, and I
23 do promise you I will not take up your time for very

1 long. I hope to be done in about 30 minutes. And the
2 reason why is because of course we've covered so much
3 already and you have been very attentive, and I don't
4 think it's worthwhile delving into the minutia that you
5 have heard and seen.

6 I want to begin by just recognizing that what
7 is obvious to us today in the late 20th century in
8 America, but really was a novel concept when this
9 country was formed, and that is we are a state; a
10 country that's governed by the rule of law. We're not
11 governed by the decrees of monarchs, we're not governed
12 by the whims of dictators, we're governed by principles,
13 by laws. And the laws are enacted in this state by a
14 legislature which represents the will of the people of
15 the State of Delaware. And your job today is to apply
16 the rules of law as seen fit by the legislature. The
17 fact that we're governed by law is a good thing because,
18 of course, laws apply equally to all, regardless of
19 whether you're poor or rich, what color you are, what
20 gender you are. And that is why we impose so much trust
21 to the form of democracy that we have.

22 Now, you were selected as jurors because both
23 sides and the Court believed that you were capable of

1 applying the law without vengeance, not through
2 sympathy, or compassion, but to apply the rule of the
3 law to the facts as you found them.

4 And the law that you have to apply at this
5 stage of the proceeding is really two-fold, two part
6 analysis, which Judge Lee has talked about, both sides
7 have, but I think because everybody is new to this it's
8 good to just quickly review it.

9 The first part of the analysis that you will
10 be conducting is to determine whether the State has
11 proven beyond a reasonable doubt what is called the
12 statutory aggravator. And in this case that is to show
13 that the murder of Anne Marie Fahey was the result of
14 substantial planning and premeditation. That's the
15 first question. And unlike your verdict, as you've been
16 told, you don't have to be unanimous on that. Although
17 you'll be instructed, I'm sure based on what we've all
18 observed, you will discuss the facts, the inferences
19 that would make your analysis for that question or that
20 you would -- you would have to do to analyze that
21 question.

22 Now, the second question you have to answer
23 is, do all of the aggravating factors, including that

1 one statutory aggravating factor, outweigh the
2 mitigating factors by what we call a preponderance of
3 the evidence?

4 And that means basically you've got -- if
5 you've got a scale with aggravators and mitigators, the
6 question is do the aggravators just barely outweigh the
7 mitigators? They have to outweigh the mitigator, but
8 they could outweigh them by this. It's not a standard
9 of proof that is as high as beyond a reasonable doubt.
10 And your answers to that question do not have to be
11 unanimous.

12 You'll report your answers to both questions
13 by a tally of the votes. And you represent the
14 conscience of the community in looking at the facts and
15 the law as it applies to those facts. And as Judge Lee
16 explained, and will explain again, the ultimate decision
17 as to what the penalty will be in this case rests with
18 Judge Lee, but he will give great weight to your
19 opinions as expressed through your votes on those two
20 questions.

21 Now, the first question, has the State proven
22 beyond a reasonable doubt that the murder of Anne Marie
23 Fahey was committed as a result of substantial planning

1 and premeditation, I'm barely going to touch upon,
2 because it was rather unusual about this case, because
3 we did not have a body, because the only living person
4 who knows exactly what happened at the instant of Anne
5 Marie Fahey's death is Tom Capano. As a result of the
6 absence of all the forensic evidence, the State proved
7 intent by showing the planning that the defendant had
8 engaged in beginning at least as early as February of
9 1996 when he approached Gerry the first time and he
10 continued.

11 So what I'll do is just remind you of some of
12 the categories that I discussed in the closing argument
13 of the guilt phase. The things to look at.

14 First, Gerry's testimony; the conversations
15 with Gerry, making up this extortion in order to make
16 Gerry ultimately not raise questions as to why a boat
17 was needed or why a gun needed to be borrowed, because
18 Gerry was under the impression that there was some
19 extortionist out there threatening his brother, so he
20 was much more understanding as far as providing him with
21 the weapon and as far as at least even entertaining the
22 idea that if some boat was needed to dispose of a body
23 he would.

1 Then there was the cooler, the lock, and the
2 chain. We have not heard any -- your verdict
3 establishes this -- we have not heard any rational
4 explanation as to why the defendant bought that cooler,
5 locker, chain other than what the State has submitted to
6 you which is of course he did it because he was planning
7 a murder and he needed to dispose of a body.

8 Then you heard Deborah MacIntyre about
9 purchasing the gun. That again is one of the main
10 things we discussed about planning. We talked about the
11 defendant's behavior on June 28, how calm he was. Think
12 about -- think about the presence of mind to hit star 69
13 from Anne Marie's apartment to place her in the
14 apartment. Somebody was thinking. Think about the
15 planning that had to go into that. Think about the
16 planning that had to go into hitting the 800 number
17 thirteen minutes later back at the defendant's home to
18 create a false alibi. And then think again, the final
19 category I spoke to you in closing was how ludicrous the
20 defendant's story was, how it defies common sense. The
21 fact that it is so irrational, it is so ludicrous points
22 to the fact that there's no rational explanation to
23 account for all the mounds and pieces of evidence that

1 we gave you except for the idea that the defendant
2 planned and premeditated this crime. They can't come up
3 with a rational explanation to fit all the pieces of
4 evidence.

5 Now, in his closing during the guilt phase Mr.
6 Oteri suggested to you that whatever plan there was
7 would look like a village idiot, and he raised, for
8 example, the issue of you'd never commit a murder in
9 your own house. But you would. If you really planned
10 something, you would. Because if you take somebody in a
11 car, you run the risk that somebody else may be there.
12 You take them out to the woods, you don't know who is
13 going to be around. The only environment Tom Capano
14 controlled absolutely on June 27th, 1996, was the
15 environment at 2302 Grant Avenue.

16 And think about how close he came to getting
17 away with murder. That shows you how well planned this
18 execution was. Think about it. The only forensic
19 evidence left in the room were pin drop size blood
20 stains. That's how close he came. Think about if we
21 weren't lucky enough to have traced Anne Marie's blood
22 down to the Atlantic Ocean, think about if we had not
23 found the cooler. He thought he was going to get away

1 with this. He had a good plan. He thought that he
2 could control the local law enforcement people like he
3 had controlled or had benefited from the Henry Herndons
4 of this world, the Dan Frawleys.

5 Remember, Henry Herndon was the managing law
6 partner of the defendant's firm when that tape that you
7 heard, that tape that had to do with Linda Marandola,
8 that tape was played for Henry Herndan and nothing
9 happened. Now, you heard the tape. How could anybody
10 listen to that tape and not think something horrible was
11 going on?

12 Four years later the tape was played for Dan
13 Frawley before the defendant was made city solicitor,
14 nothing happened. He had a track record of getting away
15 with things. It makes sense that he would assume
16 Wilmington police would be involved. You don't have to
17 assume it. He admitted that Wilmington police would
18 have the case. He thought that he could control
19 Wilmington police. Remember, he talked about the daily
20 reports he had. He had his contacts with Harry
21 Manelski.

22 So you need to think, A, that he almost got
23 away with this. But for a lot of luck he wouldn't have

1 your role as jurors in the sentencing procedure is,
2 nevertheless, important. You will provide the Court, as
3 the conscience of the community, with an advisory
4 opinion on what the jury believes the evidence has shown
5 with regard to the appropriate penalty in this case.
6 Your answers to the questions provided will be given
7 great weight by the Court in its final determination of
8 the appropriate sentence.

9 Delaware law specifies certain statutory
10 aggravating circumstances, at least one of which must be
11 found to exist beyond a reasonable doubt in order to
12 render death an available punishment. The law also
13 permits you to consider any other aggravating factors
14 not set forth in the statute which may exist in this
15 case. The defense may offer evidence relating to any
16 mitigating circumstances which it contends exists in a
17 particular case.

18 An aggravating circumstance is any factor
19 relating to the crime or to the offender which tends to
20 make the defendant's conduct more serious or the
21 imposition of a penalty of death appropriate, including,
22 but not limited to, the statutory aggravating
23 circumstance. A mitigating circumstance is any factor

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1 relating to the crime or to the offender which tends to
2 make the defendant's conduct less serious, or the
3 imposition of a death penalty inappropriate. It is
4 within your province as the jury to determine the
5 aggravating and mitigating circumstances which exist in
6 this case and the weight they should be individually
7 accorded.

8 In this case, the State contends the following
9 statutory aggravating circumstance exists:

10 The murder was premeditated and the result of
11 substantial planning.

12 This statutory aggravating circumstance
13 requires a finding of premeditation. In order for a
14 murder to be premeditated, the defendant must have
15 thought about it, considered it, or deliberated about it
16 beforehand. The design to kill must arise from the
17 sedate, deliberative process and not a rash or
18 impulsive, though intentional, act. This statutory
19 aggravating factor also requires a finding that the
20 murder was a result of substantial planning.
21 Substantial planning is planning which is considerable
22 or ample for the commission of the crime.

23 The State has the burden of establishing this

1 aggravating circumstance beyond a reasonable doubt.

2 Reasonable doubt is a practical standard.

3 On the one hand, in criminal cases the law
4 imposes a greater burden of proof than in civil cases.
5 Proof that the required statutory aggravating
6 circumstance probably exists is not sufficient.

7 On the other hand, there are very few things
8 in this world that we know with absolute certainty.
9 Therefore, you are not required to find proof that
10 overcomes every possible doubt.

11 Proof beyond a reasonable doubt is proof that
12 leaves you firmly convinced that the circumstance
13 exists. Therefore, based upon your conscientious
14 consideration of the evidence, if you are firmly
15 convinced that -- excuse me -- that the murder was
16 premeditated and the result of substantial planning, you
17 should answer the first question affirmatively. If, on
18 the other hand, you think there is a real possibility
19 for or, in other words, a reasonable doubt that the
20 murder was not premeditated and the result of
21 substantial planning, you must give the defendant the
22 benefit of the doubt by answering the question in the
23 negative.

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1 You must then weigh and consider the
2 mitigating circumstances and the aggravating
3 circumstances, including, but not limited to, the
4 statutory aggravating circumstance. You must weigh all
5 relevant evidence in aggravation or mitigation which
6 bears upon the particular circumstances or details of
7 the commission of the offense and the character and
8 propensities of the offender. Weighing the aggravating
9 and mitigating circumstances is not a mere counting --
10 excuse me -- is not a mere counting process of X number
11 of aggravating circumstances and Y number of mitigating
12 circumstances, but rather a reasoned judgment as to what
13 factual situations require the imposition of death and
14 which can be satisfied by life imprisonment in light of
15 the totality of the circumstances present. You must
16 then determine whether, based upon a preponderance of
17 the evidence, the aggravating factors outweigh the
18 mitigating factors. The side on which the greater
19 weight of the evidence is found is the side on which the
20 preponderance of the evidence exists, a mere tipping of
21 the balanced scales in favor of one side or the other.

22 You are reminded that you are to base your
23 answers to the questions set forth in the special

1 and of course that in and of itself provides support for
2 the argument I made to the jury.

3 THE COURT: Gentlemen, we are where we are. I
4 overruled the objection. The jury is now deliberating.
5 Therefore, this becomes an academic discussion and it's
6 too late in the day for that.

7 We'll stand in recess until the call of the
8 court.

9 (Court recessed at 3:25 p.m.)

10 (Court reconvened at 7:00 p.m.)

11 THE COURT: Please bring in the jury. While
12 we're waiting for Mel to get the jury, it gives me an
13 opportunity to say on the record what I have said
14 privately in chambers. I really appreciate the
15 professionalism of the lawyers on both sides, the aura
16 of cooperation that is allowing this case to flow
17 smoothly in the courtroom for the most part, and we have
18 confined our differences to sidebar and to chambers.
19 The truth of the matter is that I've grown quite fond of
20 all of you and, though I'm relieved to see this case
21 come to a conclusion, I truly will miss working with you
22 on a regular basis. You've represented the best in
23 professionalism, in ethics, in everything that is good

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1 about a profession that is often maligned. Again, I was
2 proud to have worked with you.

3 (The jury came into the courtroom at 7:02
4 p.m.)

5 THE COURT: Mr. Foreman, have you completed
6 your recommendation to the Court in the penalty phase?

7 THE FOREMAN: Yes, sir, we have.

8 THE COURT: Would you please -- Mel, would you
9 please bring that recommendation to me?

10 Thank you very much. The interrogatory to the
11 jury are as follows:

12 Does the evidence show beyond a reasonable
13 doubt the existence of the following statutory
14 aggravating circumstance?

15 The murder was premeditated and the result of
16 substantial planning?

17 The yes votes were 11; the no votes were 1.

18 Two, Does the jury find by a preponderance of
19 the evidence, after weighing all the relevant evidence
20 in aggravation or mitigation which bears upon the
21 particular circumstances or details of the commission of
22 the offense and the character and propensities of the
23 offender, that the aggravating circumstances found to

1 exist outweigh the mitigating circumstances found to
2 exist?

3 The answers are yes, ten votes; no, two votes.
4 The signature of the jurors are included on this
5 document.

6 Members of the jury, I want to thank you.
7 You've given over three months of your life to this
8 case. There's no real way to express the gratitude of
9 this court and the people of the State of Delaware.
10 You're underpaid and overworked. Welcome to state
11 employment.

12 I want to particularly thank the alternates
13 because you've been here the whole time, shared in the
14 camaraderie that occurred with the jury but did not
15 participate in either of the major decisions made by
16 this jury. As a group you not only have fulfilled your
17 civic duty but you've made a personal contribution to
18 the concept of justice in the State of Delaware.

19 You may have some questions about the
20 confidentiality of the proceedings. Because the case is
21 over, you are free to discuss the case with any person
22 you choose. However, you do not have to talk with
23 anyone about this case if you do not want to. If you

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1 tell somebody you do not wish to talk about it and they
2 continue to bother you, please inform the Court and we
3 will take measures to protect your privacy. If you do
4 decide to discuss the case with anyone, I would suggest
5 that you treat it with a degree of solemnity so that
6 whatever you say you would be willing to say in the
7 presence of your fellow jurors or under oath in open
8 court in the presence of all of the parties involved.
9 Also, if you do decide to discuss the case, please
10 respect the privacy of the views of your fellow jurors.
11 Your fellow jurors fully and freely stated their
12 opinions in deliberations with the understanding that
13 they were being expressed in confidence.

14 The press has made a request that those jurors
15 who would like to talk to them go outside on the
16 courthouse steps where an area has been prepared. We
17 will see that the appropriate security goes with you.
18 And you don't have to make that decision right now.

19 It's my understanding that I'm going to be
20 meeting with you for a brief period of time after we
21 recess and at that time you can decide what course of
22 action you wish to follow. Understand that for better
23 or worse, your ordeal is not completely over because

STATE'S EX. 18

39

Sunday

4-7-96

Happy Easter! Well, .. another yr. has passed since my last entry and man o' man has a lot happened. I've been through a lot of emotional battles. I finally have brought closure to Tom Capano. What a controlling, manipulative, insecure jealous maniac. Now that I look back on that aspect of my life, — I realize just how vulnerable I had become. It hurts me when I think about that year. For one whole year, I allowed someone to take control of every decision in my life.

Bob Conner's death hurt me/affected me more than anything. I lost my best friend, mentor, the man w/ the greatest smile ☺ My being after Bob's death became the little girl growing up in a chaotic world. I lost all sense of trust. I thought it would be easier that way.

I have been fortunate enough to find another therapist, Michelle Sullivan. No one will ever take the place of Bob, — but ... she's pretty damn close. 5 weeks ago I was diagnosed w/ Bulimia. My weight is currently 125 pounds. Pretty skinny, but I

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want more. My brother Robert is the only sibling that knows anything.
most

most likely that will remain the case. At this point, I'm afraid to share this news with Michael. I don't want him to run. I truly love him, — + I'm afraid of what he might think of me. Michael is the most wonderful person. This is the first "normal" relationship I've ever had, and I can't screw it up!

Subject: re: Monday
Author: afahey@gov.state.de.us at Internet
Date: 5/20/96 11:47 AM

I am confused about Victor's. We never talked about it. I am leaving on Thursday after work to go the Cape Cod for Memorail day. 1st question, Russia, Spain, Thailand, U.S. 2. Sara Lee was real and I believe she is still alive. Mrs. Paul not real. As for Levi Strauss, I am going to say that he was some legend cowboy. How am I doin' so far? I have had a pretty bad last 2 days. My weight has dropped 6 pounds, and I nearly fainted in Church yesterday. I am starting to get scared. I'll talk to ya later, someone is here working on my machine. amf

From tcapano@saul.com, on 5/20/96 2:53 PM:

I thought we had talked about doing dinner aggin on Thursday but obviously misunderstood. What's up with the Cape? How about dinner on Wednesday? You're wrong on the first question. In order: U.S., Russia, Thailand, Spain. (I'm not sure I believe it). You're right about Sara Lee and Mrs. Paul but wrong about Levi Strauss (little old Jewish guy). You did well enough to win in my book. I did hear from one Fahey this morning; Robert called me but I haven't returned the call yet. Did you make it to Radnor on Saturday? Who you taking to the Blue Rocks tomorrow night? Annie, I'm trying to be light but it ain't working. I'm real worried about the bad couple of days you've had, the weight loss and nearly fainting in Church. Maybe you should call Michelle today. Please call me this afternoon or email to let me know we can talk tonight after Brian Michael's.

From tcapano@saul.com, on 5/21/96 10:54 AM:

Good Morning Annie,

Glad you enjoyed the fax and that you ate well at Debbie's. Don't worry about the game tonight but remember you have the tickets for next Tuesday as well. I guess Brian did not get your air conditioner in for you last night. Your apartment must be unbearable. I'd be glad to put it in for you today; just let me know when. I'm worried about you. Don't tell me not to because you know I do. Did you call Michelle? Probably not. I assume you have an appointment with her tomorrow morning and that you intend to keep it. Please be sure you give her the \$500 tomorrow since you're out of credit. Since you're not going to go to the game and won't be here Thursday, could we have dinner tonight? It would be good for me and, at the risk of sounding pompous, I think you might get something out of it too under the circumstances. By the way, I just got in because of the dentist. Please call when you can or let me know when I can call you. I'll wait to hear from you.

Author: THOMAS CAPANO at Sers-Wilmington
Date: 6/3/96 12:19 PM
Priority: Normal
Receipt Requested
TO: afahey@state.de.us at Internet
Subject: Monday

----- Message Contents -----

Hey you. You'll get this after I'm gone but I didn't want the day to go by without saying hi. I know you're having a rough day and hope it doesn't make you crazy. Keep your fingers crossed that the rain stops so we get our round in today. Enjoy your nephew tonight and remember to tell me tomorrow what Debbie cooked. Please be careful at the gym and give me a ring if you feel like it tonight. If not, I'll talk to you tomorrow. How's about dinner Thursday night? Lobster at the Dilworthtown? You did a great job with Mark yesterday and should be proud of the way you handled it. AND TAKE YOUR VITAMINS!!!!

OBERLY, JENNINGS & DREXLER, P.A.

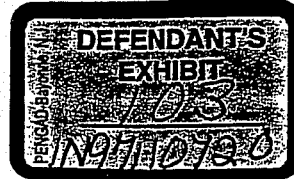
ATTORNEYS AT LAW

800 DELAWARE AVENUE

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P.O. Box 2054

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Lisa B. Borin
Ann-Marie P. Sheely

July 9, 1997

Colm F. Connolly
Assistant United States Attorney - DE
Chase Manhattan Centre
1201 Market Street, Suite 1100
P. O. Box 2046
Wilmington, DE 19899-2046

Re: Thomas J. Capano

Dear Colm:

I am in receipt of three letters from you dated June 23, 1997. Each deals with a separate issue. I would like to address them as follows:

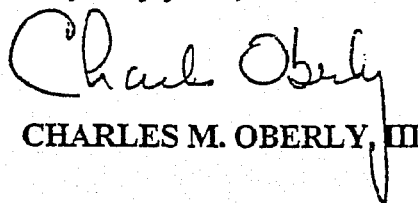
It is somewhat unclear to me why you have, again, raised the issue of Mr. Capano giving a statement. As you well know, Mr. Capano gave two statements to the Delaware State Police/Wilmington Department of Police during the early stage of the investigation. Mr. Capano also called Anne Marie Fahey's brother, the transcript of which was printed in its entirety by the News Journal on Sunday, June 29, 1997. In addition to that offer, which was rejected by the family at that time, Mr. Capano made two offers to give additional statements. Each was rejected by the Attorney General's Office.

Prior to the FBI or anyone from your office seeking to obtain a statement from Mr. Capano, Federal authorities executed a search warrant on his home. When the contents of the search warrant were made public, it was apparent that the conclusionary statements made in that affidavit precluded any chance for a further interview. The FBI clearly stated its conclusion that it believed Mr. Capano was responsible for a crime. Under these circumstances, no attorney that I have ever met would recommend the client come in and give a statement. Mr. Capano gave two statements, attempted to contact the family, and attempted on two additional occasions to give a statement, which could have been video-taped. His efforts were rejected and, he has

Colm F. Connolly
July 9, 1997
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been designated as a murderer by the FBI and had his life essentially destroyed. To suggest that he should come in and speak with you under these circumstances is completely unacceptable and unrealistic.

Very truly yours,


CHARLES M. OBERLY, III

CMO,III/dq

P.S. I would have responded to these letters sooner, but as you are aware, I was on vacation from June 20 thru July 2, 1997.

OBERLY, JENNINGS & DREXLER, P.A.

ATTORNEYS AT LAW

800 DELAWARE AVENUE

SUITE 901

P.O. Box 2054

WILMINGTON, DELAWARE 19899-2054

5-10-1996

JUL 2 1996

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(302) 576-2000

Fax (302) 576-2004

E-Mail OJD@dc-law.com

Lisa B. Borin
Ann-Marie P. Sheely

July 22, 1996

Ferris W. Wharton
Deputy Attorney General
c/o Stephen M. Walther, State Prosecutor
Department of Justice
820 N. French Street - 8th Flr.
Wilmington, DE 19801

Dear Ferris:

As you know, I represent Tom Capano, who came to me as a friend of many years. Tom has been a political, professional, and social friend since our days together in the Attorney General's Office in the mid-1970's. Unfortunately, with the single exception of the Philadelphia Inquirer, there has never been a reference to our close relationship and the fact that it would be quite expected for him to seek me out for advice. Tom has been devastated by Anne Marie Fahey's disappearance and the suspicion and innuendo surrounding the fact that he took her to dinner on June 27th and is, as far as anyone knows, the last person to see her.

Contrary to media reports, Tom has been completely cooperative in trying to solve the mystery of Anne Marie's disappearance. On Sunday morning, June 30, 1996 at approximately 3:00 a.m., Tom was awakened at his home by four police officers inquiring about Anne Marie's failure to attend a dinner and her apparent disappearance. Tom spoke to the investigators at length, volunteering detailed information concerning their June 27th dinner. Subsequently, on the same day in the afternoon, the same four police officers confronted Tom as he was returning his children to their mother's home and asked to speak with him again. Tom again complied with the request and returned to his home on Grant Avenue. More questioning ensued along with a request to inspect his residence and his Jeep Cherokee. Tom answered all the questions and without hesitation permitted the officers to walk throughout his house and to inspect his vehicle. He put no limitation on their questions or their search.

Ferris W. Wharton

July 22, 1996

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Only after two conversations with the police, a search of his home and vehicle and a telephone conversation with Kim Horstmann, wherein she indicated the police were acting like Tom was a suspect, did he come to see me. Since that time, Tom has tried to offer further assistance to help find Anne Marie. On July 8, 1996, Bart Dalton informed you that Tom was, in fact, again willing to speak with the police regarding Anne Marie. He was not, however, willing to violate any privacy interest he justifiably felt existed between Anne Marie and him and believed that nothing occurring before 1996 had any relevance to Ms. Fahey's current whereabouts. Bart also communicated that questions regarding Tom's marital relationship and other relationships he may or may not have had are totally irrelevant to any search for Ms. Fahey. In wanting to protect the privacy of people close to him who can add absolutely nothing to help find Ann Marie, but motivated by his desire to assist the police in locating her, Tom asked that we relay to you his request to speak again to the police.

For reasons unknown, Tom's offer to speak to the police was rejected with the statement that there can be no pre-conditions to areas of inquiry. We were all shocked and dismayed by that decision. Nevertheless, he then reached out and called Robert Fahey, Anne Marie's brother, and left a message for him. Mr. Fahey never returned the call and the News Journal reported erroneously that Tom had made no effort to contact the family. Moreover, Tom has also spoken at length to Bud Freel and Kim Horstmann, which I am sure you are fully aware, as well as to a third mutual friend in an effort to establish contact with the family. All of his efforts have gone unanswered.

Despite news leaks and comments that have harmed Tom's reputation and mischaracterized the rejection of his offer to talk to the police, Tom insisted Bart contact you again on July 16th to renew his offer to cooperate, a course of action we advised against. Tom had learned that the Fahey family was willing to waive any privacy interest Tom felt existed regarding his relationship with Anne Marie. With this thought in mind, Tom asked that you be advised that he was willing to talk about any aspect of their relationship from its inception to the night of June 27th when he took her home, including any confidences reposed in him by Anne Marie or insights he had gained into her character and state of mind. Again, Bart stated that Tom was not willing to discuss unrelated aspects of his private life and subject loved ones, especially his four daughters, to embarrassing and/or personal matters having nothing to do with Anne Marie's disappearance. There were no other pre-conditions that would prevent the taking of another statement. We agreed to appear at any location you chose and to have it taped. You stated there was no need to use a video tape since Michael Scanlon was not video-taped. Again, you rejected Tom's offer to speak, stating that every aspect of his life was subject to inquiry, and he could decline to answer specific questions if he so desired.

009382

Ferris W. Wharton
July 22, 1996
Page 3

It is now beyond question that Tom's continued cooperation is sought not to find or learn anything that may be helpful in locating Anne Marie, but for other purposes. Under these circumstances, I am sure you can appreciate the advice we have given Tom. We have advised him in the strongest possible terms that in light of the second rejection, he should not make any further statements, and I request that he not be asked to do so again. Nevertheless, Tom will search his memory regarding Anne Marie, and I will forward to you any information that can provide further insight into this bizarre mystery, including a chronology of their recent contacts.

In closing, I want to state that leaks and comments to the press have unfairly pummeled Tom's reputation and damaged his professional career. He told the police he brought Anne Marie home around 10:00 p.m. or shortly thereafter. Connie Blake, an unbiased witness, told the police that she heard footsteps in Anne Marie's apartment around that time, thus verifying Tom's statement. You already know he was in Philadelphia as late as 9:15 p.m. when the restaurant check was stamped.

We certainly appreciate the pressure placed upon law enforcement in a case such as this. On the other hand, we hope you can appreciate the damage caused to Tom by leaks to the press, unfounded comments, and rumors circulating in the community. Since June 30th, Tom has cooperated and, as noted above, will continue to do so.

Very truly yours,

Charlie
CHARLES M. OBERLY, III

CMO,III/dq

009383

CERTIFICATE OF SERVICE

The Law Office of Joseph M. Bernstein hereby certifies that on 2/20/07, a copy of the attached Appendix to Brief was served by

☐ First Class Mail

☒ Hand Delivery

on the following:

Loren C. Meyers, Esquire
Elizabeth R. McFarlan, Esquire
Department of Justice
Carvel State Building
820 N. French Street
Wilmington, DE 19801

Joseph M. Bernstein
Joseph M. Bernstein

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